Supreme Court, U.S.
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NO. 85-2019

IN THE SUPREME COURT
OF THE UNITED STATES

CHARLES REARDON,
Petitioner,

v.

NEIL COLA,
Respondent,

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT, NEIL R. COLA, IN OPPOSITION

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QUESTION PRESENTED

Did the United States Court of Appeals for the First Circuit correctly rule that it violates due process to send a defendant to prison for an offense he was neither accused of nor tried for?

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STATEMENT OF THE CASE

The respondent, Neil R. Cola ("Cola") was charged in state court under two indictments accusing him of violations of the Massachusetts conflict of interest laws. The indictment that is relevant here alleged that Cola, while a state employee, acted as an agent or attorney for someone other than the Commonwealth of Massachusetts in connection with a particular matter in which the Commonwealth was a party or had a direct and substantial interest.

Cola requested and was furnished a bill of particulars which, under state law, strictly limited the generalized one-sentence indictment. The case was tried and submitted to the jury on theories set forth in the bill of particulars. The jury returned a verdict of guilty, and Cola was sentenced to a year in jail.

On appeal the Massachusetts Appeals Court held that the acts Cola was charged with and sentenced to jail for were not criminal conduct. (Pet. App. C) Incredibly, the court affirmed the conviction anyway, finding that Cola was guilty of a different crime with which he was not charged, and which was never submitted to the jury or considered at all in the trial court.

Cola filed a petition for habeas corpus alleging that his conviction on appeal of a crime he was neither charged with nor tried for was a fundamental denial of due process. The district court agreed that the crime Cola was convicted of on appeal had not been submitted to the jury, but the court refused to issue the writ of habeas corpus. (Pet. App. B) Cola's application for bail was denied, and he served out his entire sentence.

The United States Court of Appeals for the First Circuit unanimously reversed on two grounds. (787 F.2d 681; Pet. App. A) Following controlling decisions of this Court, the First Circuit held first, that Cola's rights to due process were violated when he was imprisoned for a crime that was never submitted to or considered by the jury. (787 F.2d at 693-95; Pet. App. A at 53-65). Second, the court held that Cola's rights were violated by his imprisonment for a crime he had not been accused of. (787 F.2d at 695-96; Pet. App. A at 68-71).

Unfortunately, these rulings came after Cola had completed his sentence.

ARGUMENT

The petition presents no substantial question warranting review by this Court. The decision of the Court of Appeals -- which rested on two independent grounds -- was a proper application of well-settled principles of due process. Indeed, the

petition for a writ of certiori is so frivolous as to warrant an award of damages under S.Ct. Rule 49 to Cola, who, having completed his sentence for a crime he was neither charged with nor tried for, has now been put to the unnecessary expense of having to respond to the meritless petition.

Petitioner does not even argue error as to the First Circuit's holding that Cola was unconstitutionally convicted on appeal of a crime he was not charged with. (787 F.2d at 695-96; Pet App. A at 68-71). The correctness of the result below is therefore a foregone conclusion.

Petitioner disputes only the court's alternative holding that Cola's rights to due process were violated when he was convicted on appeal of a crime never submitted to the jury. There is nothing new or even controversial about this holding. This has been settled law since Cole v. State of Arkansas, 333 U.S. 196 (1948).

A. The First Circuit Properly Looked to the Trial Court's Instructions to Determine What Crime Cola Had Been Convicted Of

It has long been settled that as a matter of fundamental due process, a criminal conviction cannot be upheld on appeal on a basis not submitted to the jury. E.g., Cole v. State of Arkansas, 333 U.S. 196 (1948); Dunn v. United States, 442 U.S. 100 (1979); Chiarella v. United States, 445 U.S. 222, 236-37 & n.1 (1980); Eaton v. Tulsa, 415 U.S. 697, 698-99 (1974) (per curiam); Garner v. State of Louisiana, 368 U.S. 157, 164-64 (1961). Cola was constitutionally entitled, on appeal, "to have the validity of [his] convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." Cole v. State of Arkansas, 333 U.S. 196, 202 (1948). The Massachusetts Appeals Court in reviewing his conviction was obliged to affirm it or reverse it only on the basis of the case submitted to the jury. The affirmance on a new theory violated Cola's rights.

Citing Wainright v. Sykes, 433 U.S. 73 (1977), petitioner's first argument is that no objections were taken at trial to the court's charge. This foolish argument consists entirely of knocking down a straw-man. The First Circuit did not invalidate the conviction because of unobjected to errors in the charge; it invalidated the conviction because the Massachusetts Appeals Court unconstitutionally affirmed on a factual theory neither alleged in the indictment nor presented to the jury at trial. The First Circuit made this perfectly clear in its opinion, stating that it considered the charge to the jury "not for the purpose of finding error in it, but rather, in the limited context of due process challenges under Dunn, to determine the nature of the case before the jury." (787 F.2d at 695; Pet. App. A at 65). Accordingly, petitioner's first argument misses the point completely.

B. The First Circuit Did Not Impose New Constitutional Requirements on a Prosecutor's Argument

The petitioner's second argument is also of the strawman variety. Quoting out of context from the First Circuit's decision, petitioner claims that the First Circuit imposed new constitutional requirements on the prosecutor's opening and closing argument. This is a gross mischaracterization of the decision below.

The First Circuit determined that the jury was not charged concerning the creative theory of guilt first concocted on appeal. This alone would have been a sufficient basis for issuing the writ of habeas corpus. But, in order to give petitioner the benefit of any doubt, the court then looked to see if the appellate theory had at least been presented to the jury in the prosecutor's opening or closing argument. (787 F.2d at 693-94; Pet. App. A at 57-60).

The court found, charitably, that there was perhaps an incidental "side-reference" during the opening to facts relating to the crime articulated on appeal, and that there was no reference at all to the appellate crime during the prosecutor's closing. The court held that the arguable side-reference to the appellate theory during the opening was not constitutionally sufficient to find that the crime Cola was convicted of on appeal -- a crime not mentioned in the summation or jury charge -- was the same crime Cola was convicted of by the jury. E.g., Chiarella v. United States, 445 U.S 222, 236-37 & n.1 (1980).

The court concluded that "the prosecutor's opening statement and the judge's charge to the jury, when compared to the appellate theory . . . , are simply not the same." 787 F.2d at 700; Appendix A p. 91 (emphasis deleted). The court further stated that "because we find the appellate

theory not to be meaningfully present in any of the principal stages of trial, we need not decide the issue of whether certain stages, specifically, the judge's charge and the prosecutor's summation, deserve more scrutiny or weight than others." 787 F.2d at 693 n.11; Pet. App. A at 57 n.11.

The court did not purport to regulate the content of the opening or closing. It simply held, correctly, that they provided no factual support for the frivolous contention that the appellate theory of guilt was before the jury.

C. The First Circuit Merely Followed Longstanding Decisions of this Court Holding that it Violates Due Process to Be Convicted on Appeal of a Crime Neither Alleged in the Indictment Nor Presented to the Jury at Trial

Petitioner makes the absurd argument that the principles applied by the First Circuit are matters only for supervisory review of federal trials. Petitioner overlooks the fact that the First Circuit's decision is

compelled by a long line of due process cases commencing with Cole v. State of Arkansas, 333 U.S. 196 (1948), where under identical circumstances this Court invalidated a state court conviction on due process grounds.

In Cole, as here, the state appellate court upheld a conviction on a ground that was supported by the evidence, but which differed from the theory upon which the case was tried and presented to the jury. This Court held as follows:

> If, as the State Supreme Court held, petitioners were charged with a violation of § 1, it is doubtful that the information fairly informed them of that charge and that they sought to defend themselves against such a charge; it is certain that they were not tried for or found guilty of it. It is as much a violation of due process to send an accused to prison following conviction on a charge on which he was never tried as it would be to convict him upon a charge that was never made . . . . To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.

Id. at 201 (emphasis added).

The holding in Cole that a conviction cannot constitutionally be upheld on theories that were never tried, is directly on point and dispositive of all of petitioner's arguments. Cole has been followed by this Court in numerous due process cases involving both state and federal convictions. E.g., Eaton v. Tulsa, 415 U.S. 697, 698-99 (1974) (per curiam); Garner v. State of Louisiana, 368 U.S. 157, 163-64 (1961); Dunn v. United States, 492 U.S. 100 (1979).

Among these decisions, the First Circuit found Dunn v. United States, 442 U.S. 100 (1979) to be a particularly relevant precedent. Petitioner, noting that Dunn was a federal prosecution, asserts here, as it did below, that Dunn was not a due process case, but was decided under this Court's supervisory powers over the lower federal courts. (Petition at 21). This is a truly

frivolous contention as shown not only by Cole, supra, but by the language of Dunn itself:

> To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends due process. . . . [A]ppellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial. As we recognized in Cole v. State of Arkansas, supra, 333 U.S. at 201, 68 S.Ct. at 517, '[i]t is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.'

442 U.S. at 106 (emphasis added).

No court has ever interpreted Dunn as being rooted in the supervisory powers rather than in the due process clause. Such a construction would be completely at odds with the holding and reasoning of both Dunn and the long line of due process cases that preceded it.

In sum, the First Circuit's decision was nothing more than an application of well-settled principles to a factually complex prosecution. The case did not create new law and it clearly is not in conflict with the decision of any other circuit or of a state court of last resort. Petitioner has failed even to argue any errors as to one of the two bases for the court's decision. The petition for a writ of certiorari is utterly frivolous and should be denied with an order awarding damages to Cola pursuant to S.Ct. Rule 49.

CONCLUSION

The respondent, Neil R. Cola, respectfully requests that the petition for a writ of certiori be denied and that the court award damages to respondent in accordance with the provisions of S.Ct. Rule 49.

By his attorneys,

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